

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**WRIT PETITION NO.2876 OF 1991**

- |                                    |   |                |
|------------------------------------|---|----------------|
| 1. LML Ltd. a company registered   | ) |                |
| under the Companies Act, 1956,     | ) |                |
| having its administrative office   | ) |                |
| at 714, Raheja Chambers, Nariman   | ) |                |
| point, Bombay - 400 021.           | ) |                |
|                                    | ) |                |
|                                    | ) |                |
| 2. Sanjeev Shriya s/o. Balkrishna, | ) |                |
| Kanpur, Indian Inhabitant, a       | ) |                |
| Director and shareholder of the    | ) |                |
| 1st Petitioner, residing at 113    | ) |                |
| /181, Swarup Nagar, Kanpur.        | ) | ..Petitioners. |

V/s.

- |                                 |   |                |
|---------------------------------|---|----------------|
| 1. M.K. Venkataraman, Assistant | ) |                |
| Commissioner of Income Tax,     | ) |                |
| Central Circle 14, Bombay       | ) |                |
| having his office at CGO        | ) |                |
| Building Annexe, 11th Floor,    | ) |                |
| Maharshi Karve Marg,            | ) |                |
|                                 | ) |                |
| 2. Union of India               | ) | ..Respondents. |

Mr.J.D.Mistry, Advocate with A.K.Jasani for the petitioners.

Mr.Parag Vyas, Advocate for the respondents.

**CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.**

**DATED : 10TH OCTOBER, 2005.**

**JUDGMENT (PER J.P.DEVADHAR, J.)**

1. Although the Constitutional validity of Section 143 (1)(a) of the Income Tax Act, 1961 ('the

Act' for short) is challenged in this petition, the learned counsel for the petitioners has given up the issue relating to the constitutional validity and has restricted his arguments to challenge the intimation issued under section 143(1) (a) of the Act dated 28/5/1990 for AY 1989-90, rectification order dated 5/2/1991 passed under section 154 of the Act rectifying the intimation dated 28/5/1990 and the intimation under section 143 (1)(a) of the Act dated 27/3/1991 for the assessment year 1990-91.

2. The facts relevant for the present petition are as follows:-

During the financial year 1988-89 relevant to AY 1989-90, two companies namely LML Fibres Ltd. and Prkati Synthetics Ltd. had paid interest due to the petitioner No.1 Company (hereinafter referred to as 'the assessee') after deducting tax at source (TDS) as per the provisions of the Act. LML Fibres Ltd. had deducted TDS amount of Rs.89,39,431/- and Prkati Synthetics Ltd. had deducted TDS amount of Rs.9,92,324/-. The said two companies failed to deposit the aforesaid TDS amount with the I.T. department within the time prescribed under the Act and, therefore, the Income Tax authorities initiated

action against the said two companies. Thereupon both the said two companies moved this Court by filing separate Writ Petitions and this Court by its order both dated 9/10/1989 permitted the two companies to deposit the TDS amount with the I.T. department in instalments upto 15th April, 1990. It is an admitted fact that both the companies have deposited the TDS amount in the Government treasury on or before 15th April, 1990 as ordered by this Court.

3. On 21/12/1989 both the companies had issued TDS certificates to the assessee under section 203 of the Act, stating therein that the amount of TDS deducted would be paid to the Central Government within the time permitted by this Court.

4. On 29/11/1989 the assessee filed its return of income for A.Y. 1989-90 declaring loss of Rs.4,24,31,051/- with working of book profits in accordance with the provisions of section 115-J of the Act. As it was a loss return, the assessee claimed refund of tax paid by it amounting to Rs.1,21,23,087/- which inter alia included the amount of tax deducted at source under section 194A of the Act by LML Fibres Ltd. for Rs.89,39,431/- and by Prkati Synthetics Ltd. for Rs.9,92,324/- .

5. On 28/5/1990 the assessing officer issued an intimation to the assessee under section 143 (1)(a) of the Act for AY 89-90. By the said intimation, the assessing officer made prima facie adjustments such as tax on book profits under section 115J, additional tax under section 143(1A) to the loss return filed by the assessee. After giving credit of pre-paid tax amounting to Rs.1,18,33,108/- which included Rs.99,31,755/- being tax deducted at source by the aforesaid two companies and adjusting the TDS liability, the assessing officer determined the refund payable to the assessee at Rs.41,78,277/- and interest amounting to Rs.8,77,438/- under section 244A of the Act.

6. Thereafter, on 18/1/1991, the assessing officer issued a notice under section 154 of the Act calling upon the assessee to show cause as to why the intimation dated 28/5/1990 should not be rectified by withdrawing the credit of TDS given to the assessee as the TDS amounts were in fact not paid to the Central Government by the two companies on the date on which the the return of income was filed by the assessee as is evident from the TDS certificates issued by the two companies. It was further stated that since the TDS

amount was not paid to the Central Government, the credit for TDS could not be given and consequently interest granted under section 244A of the Act would also have to be withdrawn.

7. The assessee objected to the withdrawal of the credit of TDS and the interest granted under section 244A of the Act. It was contended that the said two companies had paid the TDS amount to the I.T. department within the time allowed by this Court and under section 205 of the Act the Income Tax authorities cannot demand the TDS amounts from the assessee for the failure of the two companies which deducted the TDS, to pay the TDS amount to the Central Government. Accordingly, it was submitted that the credit for the TDS amount with interest granted under section 244A of the Act cannot be withdrawn.

8. Rejecting the contention of the assessee the assessing officer passed the impugned rectification order under section 154 of the Act on 5/2/1991 thereby withdrawing the credit of TDS to the extent of Rs.49,65,878/- as well as the interest amount of Rs.8,77,438/- granted under section 244A of the Act and raised a demand of Rs.58,43,316/- for AY 1989-90.

9. For the assessment year 1990-91, the assessee was entitled to refund of Rs.2,18,79,061/-. On 27/3/91 the assessing officer issued a notice under section 245 of the Act for adjusting the demand of Rs.58,43,316/- raised by the rectification order dated 5/2/91 for AY 89-90 from the refund due for AY 1990-91. On the same day, i.e. on 27/3/1991 itself the assessing officer issued an intimation under section 143(1)(a) of the Act for A.Y.1990-91 adjusting the demand of Rs.58,43,316/- raised for assessment year 1989-90. Challenging the aforesaid action of the assessing officer, the petitioners have filed the present petition.

10. At this stage, we may note that while admitting the Writ Petition, this Court directed the revenue to refund to the petitioners the TDS amount of Rs.49,65,878/- subject to the final orders that may be passed in this Writ Petition in view of the fact that said TDS amount was deposited into the Government treasury by the two companies and in view of the loss return the assessee was entitled to obtain refund of that amount. Accordingly, the revenue has refunded the amount of Rs.49,65,878/- to the assessee.

11. Mr.Mistry, learned counsel appearing on behalf of the petitioners submitted that once the TDS amount

is deducted from the amount due to the assessee, then as per section 205 of the Act, it is not open to the revenue to recover that amount from the assessee on the ground that the tax deductor had failed to deposit the TDS amount in the Government treasury. He submitted that the credit for TDS amount cannot be denied to the assessee on the ground that the tax deductor has not deposited the TDS amount into the Government treasury. In any event, he submitted that in the present case, the TDS amount was admittedly deposited by the two companies into the Government treasury on or before 15/4/1990 as per the orders of this Court and, therefore, in the intimation under section 143(1)(a) dated 28/5/1990 the credit given for TDS amount was just and proper. He submitted that the withdrawal of the said credit on the ground that on the date on which the return was filed, the TDS amount was not deposited into the treasury is wholly unjustified because firstly, the liability to deposit the amount deducted as TDS was on the two companies and for their failure to deposit the amount in the Government treasury the assessee cannot be penalised. Secondly, on acceptance of the loss return filed by the assessee, tax paid by the assessee including the TDS amount becomes legally due to the assessee. Thirdly, on the date of intimation issued under section 143(1)(a) of the Act,

the TDS amount was in fact deposited into the treasury by the two companies and therefore, withdrawal of the TDS amount by initiating rectification proceedings under section 154 of the Act was wholly improper. The counsel for the assessee submitted that for the same reason withdrawal of the interest granted under section 244A of the Act was also unjustified.

12. Mr.Mistry further submitted that it is well established in law by the decision of this Court in the case of **A.N.Shaikh V/s. Suresh B.Jain [165 I.T.R. 86]** that adjustment of refund against any outstanding demand cannot be made under section 245 of the Act without giving previous intimation to the assessee in writing. In the present case, the intimation in writing for adjustment of the demand for AY 89-90 from the refund due for AY 90-91 and the actual adjustment of the demand has been made simultaneously on 27/3/1991 in contravention of section 245 of the Act. Accordingly, Mr.Mistry submitted that the adjustment of the demand vide intimation dated 27/3/91 is also liable to be quashed and set aside and the assessee is entitled to the credit for the TDS amount as well as the interest under section 244A of the Act. However, Mr.Mistry fairly stated that if the Court is of the opinion that the issue regarding the grant of interest

is a debatable issue, then the assessee be permitted to agitate the issue by filing an appeal against the intimation dated 27/3/1991 and the appellate authority be directed to consider the appeal on merits after condoning the delay in filing the appeal.

13. As regards the addition of additional tax under section 143(1A) in the computation of income set out in the intimation under section 143(1)(a) for AY 1989-90 and AY 1990-91, Mr.Mistry submitted that the same are also liable to be quashed and set aside. He submitted that in the explanatory note sheet appended to the intimation dated 25/8/1990, the assessing officer appears to have made disallowance of expenditure amounting to Rs.12,77,320/- but the said disallowance does not find place in the final computation of income made in the intimation. Since there is no disallowance of Rs.12,77,320/- made in the final computation of income, additional tax of Rs.1,34,119/- computed at the rate of 20% on the disallowance of Rs.12,77,420/- cannot be sustained. Relying upon the decision of this Court in the case of **Khatau Junkar Ltd. [196 I.T.R.55]**, Mr.Mistry submitted that in the intimation for AY 1990-91 the assessing officer was not justified in making disallowance of Rs.12,43,441/- because the same were debatable issues

and, therefore, the disallowance of Rs.12,43,441/- cannot be sustained and consequently the additional tax of Rs.1,24,344/- levied on the disallowance of Rs.12,43,441/- is also liable to be quashed and set aside.

14. Mr.Kotangale, learned counsel for the revenue, on the other hand submitted that in the present case, it is an admitted position that the TDS amount was not deposited in the Government treasury at the time of the filing of the return for AY 89-90 and, therefore, credit for the TDS amount could not be given in the intimation dated 25/8/1990. Since the credit for the TDS amount was erroneously given, the assessing officer was justified in rectifying the error by passing an order under section 154 of the Act.

15. Relying upon the decision of the Gauhati High Court in the case of **C.I.T. V/s. Om Prakash Gathani [242 I.T.R. 638]** counsel for the revenue submitted that mere deduction of tax would not amount to total discharge of tax liability and the credit for the tax deducted can be given only if the amount is paid to the Central Government. Therefore, in the present case, as the TDS was not deposited on the date of filing the return, withdrawal of the credit for TDS amount was

justified and the consequent withdrawal of interest granted under section 244A was also justified. With reference to the levy of additional tax under section 143(1A) of the Act, the counsel for the revenue submitted that since the processed income was more than the returned income, the levy of additional tax in the assessment years in question was justified.

16. We have carefully considered the rival submissions. In the present case, it is an admitted fact that the TDS amount deducted from the income of the assessee during the financial year 1988-89 by the two companies has been paid to the Central Government. Credit for the said TDS amount was given to the assessee vide intimation under section 143(1)(a) for AY 89-90, but the same is withdrawn by the assessing officer only on the ground that the tax deductor had not deposited the amount of TDS till the date of the filing of the return by the assessee. Therefore, the question to be considered in this petition is, whether, the assessing officer was justified in withdrawing the credit given to the assessee for the TDS amount which was admittedly paid to the Central Government, merely on the ground that the said TDS amount was paid to the Government treasury by the two companies after the return of income was filed by the assessee ?

17. Under section 199 of the Act, credit for the TDS amount is given to the person from whose income the said amount is deducted only if the TDS amount is paid to the Central Government. At the relevant time, i.e. for AY 89-90 although the credit was given on furnishing the TDS certificate, what was crucial for availing the credit of TDS was the payment of the TDS amount into the Government treasury. In the present case, in both the TDS certificates issued by the two companies which were annexed to the return, it was clearly stated that the TDS amounts would be paid to the Central Government as per the time schedule fixed by this Court. It is not in dispute that the TDS amount has been paid to the Central Government by the two companies as per their orders of this Court. Thus, in the present case, even though the TDS amount was not paid to the Central Government on the date of the filing of the return, it was admittedly paid to the Central Government before the return of income was taken for processing. Having found that the TDS amount was paid to the Central Government, the assessing officer gave credit for the TDS to the assessee vide intimation dated 25/8/1990. Withdrawal of the said credit on the ground that the TDS amount was not paid to the Central Government on the date of filing of the

return, is not justified because, the assessee had an obligation to file the return of income within the time stipulated under section 139 of the Act. Failure to file the return of income within the stipulated time would have rendered the assessee liable for penalty. Since the TDS amount was deducted from the income of the assessee in the relevant financial year, the assessee was justified in computing its total income by taking into account the TDS amount deducted from its income. On processing the return of income, the assessing officer decided to accept the loss return filed by the assessee. Since the TDS amount claimed was already paid to the Central Government, the assessing officer was justified in giving credit for the said TDS amount. Therefore, withdrawal of the credit for the TDS amount given to the assessee on the ground that the said amount was not paid to the Central Government on the date of the filing of the return cannot be sustained.

18. Heavy reliance was placed by the counsel for the revenue on the decision of the Gauhati High Court in the case of Om Prakash Gattani (supra). That decision, in our opinion, is wholly distinguishable on facts. In that case, even though the TDS was not paid to the Central Government, the assessee therein was

claiming credit for the TDS amount and the revenue on the other hand wanted to recover the TDS amount from the assessee therein on the ground that the TDS has not been paid to the Central Government by the tax deductor. In that context the Court held that the assessee therein is not entitled to the credit for the TDS amount till it is paid to the Central Government and that the revenue is not entitled to recover the TDS amount from the assessee therein as the assessee had no control over the discharge of tax liability by the tax deductor. In the present case, the facts are totally different. As stated earlier, in the present case, the TDS amount has been in fact paid to the Central Government and, therefore, credit for the TDS amount could not be denied to the assessee. Thus, withdrawal of the credit for the TDS amount by the impugned order dated 5/2/91 being illegal, adjustment of the said amount from the refund due to the assessee for AY 1990-91 is also illegal and is liable to be quashed and set aside.

19. As stated earlier, as per the interim order passed in this Writ Petition, the revenue has already refunded the TDS amount of Rs.49,65,878/- to the assessee. As we have held that the assessee is entitled to the credit of the said TDS amount of

Rs.49,65,878/-, the assessee is entitled to retain the said amount received by it pursuant to the interim order passed in this Writ Petition.

20. As regards the withdrawal of the interest amount of Rs.8,77,438/- granted under section 244A of the Act for AY 89-90 is concerned, we are of the opinion that the issue as to whether the assessee was entitled to the interest under section 244A and if so to what extent is a debatable issue and as fairly submitted by the learned counsel for the assessee that issue can be agitated before the appellate authority. Accordingly, we permit the assessee to agitate the issue relating to the withdrawal of interest under section 244A of the Act by the impugned order dated 5/2/91, by filing an appeal within 4 weeks from today. If the appeal is filed with an application for condonation of delay as stated above, then the appellate authority shall consider the application for condonation of delay sympathetically, by taking into account the period during which the issue was pending before this Court. We may note that the assessee had in fact filed an appeal against the intimation dated 25/8/1990 for AY 89-90, but the same was dismissed in view of the pendency of this Writ Petition.

21. Now, we take up the dispute regarding the levy of additional tax under section 243(1A) of the Act. In the intimation for AY 89-90 the assessing officer has made addition of Rs.1,34,119/- as additional tax under section 143 (1A). From the adjustment sheet annexed to the intimation, it appears that the assessing officer sought to make disallowance of Rs.12,77,320/- and on the said disallowance, additional tax under section 143(1A) at the rate of 20% has been computed at Rs.1,34,119/-. As rightly submitted by the counsel for the assessee, the said disallowance of Rs.12,77,320/- contained in the adjustment sheet has not been taken into account while computing the total income of the assessee. If the amount sought to be disallowed itself is not taken into account while computing the total income, then, the question of levying the additional tax on the amount of disallowance does not arise at all. Therefore, the addition of Rs.1,34,119/- as additional tax made in the intimation dated 25/8/1990 is without any basis and the same is liable to be deleted. As regards the addition of Rs.1,24,344/- as additional tax on disallowance of Rs.12,43,441/- made in the intimation for AY 1990-91 is concerned, the issue needs consideration and the same can be agitated by filing an appeal against the intimation dated 27/3/1991.

22. In the result, the petition is partly allowed by passing the following order :-

- i) It is held that the assessee is entitled to the credit for the TDS amount in the A.Y. 89-90. Accordingly, order dated 5/2/1991 to withdraw the said credit and adjustment of the demand raised by such withdrawal from the refund due for A.Y. 1990-91 are set aside.
- ii) Levy of the Additional tax amounting to Rs.1,34,119/- under section 143 (1A) of the Act for AY 89-90 is set aside.
- iii) As regards the issues relating to the claim for interest under section 244A of the Act for both the assessment years and the levy of additional tax under section 143(1A) in the A.Y. 1990-91 vide intimation dated 27/3/91, the assessee is permitted to agitate the said issues by filing an appeal. If such appeal with an application for condonation of delay is filed within 4 weeks from today, the appellate authority while

considering the application for condonation of delay, shall take into account the period during which the assessee was agitating the said issues, bona fide, before this Court.

23. Petition is disposed of in the above terms with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)